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in the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-764

BETH W. CORPORATION, a Florida corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner BETH W. CORPORATION prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on August 15, 1973, which affirmed, per curiam, the Final Judgment of dismissal rendered by the United States District Court for the Southern District of Florida on November 20, 1972.

OPINIONS BELOW

The Memorandum Opinion of the District Court for the Southern District of Florida filed November 20, 1973, is reported at 350 F.Supp. 1190 (1973) and is re-printed as Appendix A. The District Court's Order on Post Trial Motions entered December 26, 1972, was not reported but is re-printed as Appendix C. The Opinion of the Court of Appeals is reported at 481 F.2d 1401 (1973) and is re-printed as Appendix D.

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals, re-printed in Appendix D, was entered and filed on August 15, 1973. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE QUESTION PRESENTED FOR REVIEW

WHETHER IN A DIVORCE PROPERTY SETTLEMENT AGREEMENT, A HUSBAND'S TRANSFER TO HIS WIFE (IN EXCHANGE FOR A RELEASE OF HER MARITAL RIGHTS) OF APPRECIATED LAND WHICH HAD BEEN TITLED BY THE HUSBAND IN JOINT NAMES WITHOUT THE WIFE'S KNOWLEDGE, IS A TAXABLE EVENT AS TO THE HUSBAND SUCH THAT THE WIFE'S BASIS IN THE LAND IS ITS FAIR MARKET VALUE AT THE TIME OF THE TRANSFER TO HER?

STATUTES INVOLVED

The statutes involved are Sections 1001 and 1002, Internal Revenue Code of 1954. The pertinent portions of these Statutes are re-printed in Appendix G.

STATEMENT OF THE CASE

The District Court action by Petitioner Beth W. Corporation, a Florida corporation, was a suit for refund of 1965 corporate income tax under 28 U.S.C. § 1346(a)(1). The questions presented to the District Court, on appeal and in this petition involve the income tax consequences that arose from distributions of real estate to the plaintiff's sole stockholder, Jewell E. Waldrep, incident to her divorce from Wiley Waldrep and pursuant to their property settlement agreement of December 19, 1957.

The District Court dealt with two precise questions: first, whether the Waldreps had been partners in a dairy farm during their marriage such that the divorce dissolved the partnership; a special jury verdict found no partnership.

The second question, *viz.*, whether the allocation of properties under the property settlement agreement was a taxable or a non-taxable division of property between spouses under the rule of *United States v. Davis*, 370 U.S. 65 (1962), was submitted by the parties to the District Court. The Court held in its Memorandum Opinion (App. 6) that the agreement effected a non-taxable division of property between co-owners and entered a Final Judgment (App. 9) of dismissal in favor of the Government.

Petitioner's post trial motion to amend the Final Judgment was granted in part by the District Court's Order on Post Trial motions (App. 11-12). Petitioner appealed the entry of the Final Judgment to the Court of Appeals which affirmed the District Court. This Petition followed.

STATEMENT OF FACTS

Jewell and Wiley Waldrep were married in 1927 when she was 14 years old and he was 20. Their only child, a daughter, was born the following year.

Shortly after the marriage Mr. Waldrep began a dairy farm in Broward County which grew over three decades such that at the time of their divorce in 1957, it comprised a 1,000 head dairy herd and 1,731 acres of land (which was then worth $1,685,600.00).

Throughout their marriage Mrs. Waldrep had very little to do with her husband's dairy farm. In 1930 she became quite ill; frequently hospitalized, she was unable to manage her household duties for the remainder of the marriage.

She likewise made no contributions of capital to her husband's dairy. Although she never regarded herself as his partner, his financial difficulties in the early depression years dictated that appearances be otherwise.

Twice in the 1930's he suffered a foreclosure of his dairy herd. In 1932 a feed supplier recovered a $794.60 judgment against him. Mr. Waldrep confirmed at trial that not until 1941 was he able to pay the same.

The immediate effect of the judgment was the change it brought in the way money was handled in the dairy operation. Before the judgment Mr. Waldrep's weekly milk check from his dairy cooperative was payable to "W. P. Waldrep"; he explained to his wife that to avoid the judgment the checks would thereafter be payable to both of them.

The same pattern evolved as to land purchases. Beginning in 1929, Mr. Waldrep began to acquire lands in Broward County. The first purchase was a five acre tract for the dairy business and the family homestead. The deed conveyed title to "Wiley Waldrep and Jewell Waldrep, his wife". Mrs. Waldrep never saw the deed and remained completely unaware that title had been taken in her name.

No other land was purchased prior to the 1932 judgment. From 1936 until the divorce in 1957, Mr. Waldrep purchased 1,726 acres of land near the dairy farm. Both spouses testified that he alone did all the land buying and never discussed the purchases with Mrs. Waldrep. In her words:

> ". . . Only once in a while he would say, 'I just bought some land.' He never was a person to come in and discuss the business with me."

From 1936 through 1941 the judgment remained unsatisfied and all lands purchased in this period were titled in the name of both spouses. After satisfaction of the judgment Mr. Waldrep continued to title new purchases of land in the names of both spouses until marital difficulties developed. From October, 1954, until the divorce in December, 1957, there were nine purchases of additional land

(excluding purchase of a new family residence in 1955); of these purchases eight were titled in Mr. Waldrep's name alone.

Not until a few days before trial in the District Court had Mrs. Waldrep ever seen any of the 54 deeds. At trial, Mr. Waldrep doubted that he had ever shown her any of the deeds and the District Court found in its Order on Post Trial Motions (App. 11):

> "(Mrs. Waldrep) did not always know of the purchases. She did not know *until institution of the divorce* proceedings whether the properties had been acquired in the name of her husband or joint names." (emphasis added)

but the uncontroverted evidence established that she did not know *until the instant case* as to how the properties were titled.

Mrs. Waldrep filed suit for divorce in April, 1957, and the case was bitterly contested. An amended bill of complaint on the grounds of adultery and cruelty was filed in October, 1957, and it contained two statements concerning the property of the parties:

* * *

> (4) More than 30 years ago the *parties embarked on a joint career* whereby they acquired substance and property enabling them to live together in a harmonious marriage. That Plaintiff continued to assist Defendant in his work and at the same time successfully carried on the duties of a housewife....
>
> * * *

> (9) That the Defendant is a man of means and owns considerable real estate, personal property, cash, stocks, bonds and Plaintiff prays that this Honorable Court shall make a true and equitable division of the aforementioned assets. That *most of the real estate is held jointly by the parties* hereto *but because of expediency certain assets are vested exclusively in the name of the Defendant*, but that the Plaintiff has a priority interest therein and is entitled to an equitable portion thereof. . . . (emphasis added)

In the prayer for relief Mrs. Waldrep sought "allowance of alimony" and that the "Court make an equitable and suitable division of the property rights of the parties hereto".

Despite the tenor of these apparent admissions concerning her knowledge and her contributions, the testimony in the District Court of both Mrs. Waldrep and her attorney in the divorce proceeding, Joe Varon, established that she had not read the pleadings before she signed them but relied entirely on Mr. Varon. (Both she and Mr. Waldrep were of limited education—she completed the ninth grade and he the third.)

Varon confirmed she gave him no information concerning title to the lands and explained that none of the above statements in the pleadings were based on any information from her but rather, were simply (in the words of the District Judge) "standard divorce boilerplate" (Order on Post Trial Motions).

* * *

Only one draft of the property settlement agreement was prepared by Mr. Waldrep's attorney who submitted it the day before the final hearing to Mrs. Waldrep and Varon. The latter dictated one minor change (adding a handwritten Paragraph 12) but otherwise accepted the document in its entirety.

Varon recounted the divorce was "very bitterly contested" and as the opposition became more manifest he even had to engage some investigators. But shortly after the amended complaint was filed in October, Mrs. Waldrep, in his words:

> ". . . took the position that she just wanted out, she wanted a divorce, period, and she was willing to settle up. . . ."

When asked whether the proposal submitted by Mr. Waldrep's attorney was a "take it or leave it proposition" Varon replied:

> "Well, I think that they knew that Mrs. Waldrep wanted a divorce and they presented to me an agreement that they could live with and they felt that Mrs. Waldrep could accept. Mrs. Waldrep was willing to accept it. I think she would have accepted less."

The agreement (App. 17-20) allocated to each certain real and personal properties, dividing many assets on the basis of one-half to each spouse (e.g., non-dairy cash, stock in Home Milk and certain other assets). Mr. Waldrep was alloted 768 acres which were then worth $1,356,304; Mrs. Waldrep was alloted 821 acres which were then worth $1,329,200.

Although Mr. Waldrep testified that the basis for the apportionment of properties was an attempt "to divide the property . . . around 50-50" using valuations ascribed to them, and this testimony was given great weight by the District Court (Memorandum Opinion, App. 6) it was contradicted by the property settlement agreement itself; under paragraph 7(h) (App. 20) the husband retained "all the cattle, dairy equipment and dairy buildings . . . known as 'Waldrep Dairy'." The Waldreps' "Statement of Assets and Liabilities of July 31, 1957, referred to in the agreement, indicated the dairy farm's assets (fully depreciated) were $277,060.55 and its liabilities were $52,886.52. The division was unequal.

So far as Mrs. Waldrep knew, the lands she was receiving were her husband's; as to her then pending claim for alimony the property settlement agreement provided (App. 18-19):

> (4) That the Wife covenants and agrees that *she is accepting the property* as set forth above *as and for and in lieu of any support money, maintenance, alimony,* right of dower and any and other rights, claims or demands of any nature or character whatsoever, past, present or future, which she now has or hereafter can or may have against the Husband and/or his properties or estate *and the same is for a full, complete and final settlement.*
>
> (5) The Wife does absolutely and without reservations or restrictions of any kind, waive any and all claims for alimony, support money or

maintenance, except as set forth in this Agreement, either now or in the future. (emphasis added)

Her attorney's testimony concerning these Paragraphs was as follows:

"Q Now, all of those rights were being claimed by her in the divorce, is that right?
A Yes, sir. Let me tell you, in a divorce you claim everything.

Q That is what she gave up, is that correct?
A *She gave up everything in order to get what she is getting here.*" (emphasis added)

Pursuant to the property settlement agreement (which was incorporated in the final decree of divorce Mr. Waldrep deeded to Mrs. Waldrep 821 acres on December 20, 1957; the difference between the property's fair market value at the time of this transfer ($1,329,200) and its basis ($11,538.41) was $1,317,661.59. The husband made no reference to this gain in his (separate) 1957 income tax return.

In 1963, Mrs. Waldrep deeded to Petitioner Beth W. Corporation, her wholly owned corporation, 796.27 acres of the land she had received from Mr. Waldrep in the divorce proceeding. On October 31, 1964, Beth W. sold 40 of these acres for $113,000. Beth W. contended in its amended income tax return for year ending July 31, 1965, that its basis[1] as to that land was the land's fair market

[1]It was stipulated (Pre-Trial Stipulation, page 4) that Beth W.'s basis in the land at the time it was acquired by Mrs. Waldrep was the same as her basis in the land at the time she transferred it to Beth W.

value on December 18, 1957, the date of the property settlement agreement, under the rule of *United States v. Davis*, 370 U.S. 65 (1962).

The Government, in addition to contending that Mrs. Waldrep's 1957 basis was that of a partner receiving a share of partnership assets incident to a dissolution (which is no longer maintained by the Government), asserted that her basis was the original cost of the land when it was acquired by Wiley Waldrep and titled for the most part in joint names.

As noted above (Petition, page 3), the Government's contention that the allocation of properties was a non-taxable division between co-owners was upheld by the District Court in its Memorandum Opinion and Final Judgment entered November 20, 1972.

REASONS FOR GRANTING THE WRIT

This petition raises substantial questions concerning the uniform administration of the federal income tax law as applied to property transfers that result from divorce property settlement agreements. This Court in *United States v. Davis*, 370 U.S. 65 (1962) clearly established the rule that a husband's transfer of appreciated property to his wife in exchange for a release of her inchoate marital rights is a taxable transfer to the husband and the wife's basis in the transferred property is its fair market value.

The two principal reasons why a writ of certiorari should issue are: (1) the District Court's decision in the instant case that the Waldrep property settlement agree-

ment was a non-taxable division of property is in direct conflict with this Court's decision in *United States v. Davis* and (2) the District Court's decision also conflicts with the application of the Davis rule that was made by the Court of Appeals for the Tenth Circuit in *Pulliam v. Commissioner*, 329 F.2d 97 (10th Cir. 1964), *affirming* 39 T. C. 883 (1963).

1. *Basis Of Conflict With United States v. Davis:*

In *United States v. Davis*, 370 U.S. 65 (1962), the taxpayer transferred to his wife certain stock pursuant to a property settlement agreement which was then incorporated in a final decree of divorce; the wife accepted the same in satisfaction of all her marital claims and rights against the husband. This property was owned by the taxpayer under state law subject to his wife's statutory interest, akin to dower, in the property. Attempting to tax the appreciation in the property value as capital gain realized by the taxpayer upon transfer to his wife, the Commissioner found a taxable "sale or other disposition" of the property.

Before the Supreme Court the taxpayer argued that the transfer was a nontaxable division of property between two co-owners. This was rejected by the unanimous Court which recognized the importance of finding a taxable event in such circumstances and established the criteria for determining whether under state law the wife's interest in the husband's property is sufficient to "reach the dignity of co-ownership"; the Court stated:

> The taxpayer's analogy, however, stumbles on its own premise, for the inchoate rights granted a

> wife in her husband's property by the Delaware law do not even remotely reach the dignity of co-ownership. *The wife has no interest—passive or active—over the management or dispositoin of her husband's personal property. Her rights are not descendable and she must survive him to share in his intestate estate.* Upon dissolution of the marriage she shares in the property only to such extent as the court deems 'reasonable.' (370 U.S. 65, 70) (emphasis added)

There has been no decision of any federal appellate tribunal that has applied the "dignity of co-ownership" criteria announced in *Davis* to a common law tenancy by the entireties as it is known in Florida.

The main reason why Jewell Waldrep's rights as a spouse under Florida law never attained the "dignity of co-ownership" standard of *Davis* was the fact that she was a mere tenant by the entirety in a common law jurisdiction.

In *Davis* the Court discussed the wife's rights in her husband's property under Delaware law and found them insufficient because

> the wife has no interest—passive or active—over the *management* or disposition of her husband's personal property. Her rights are not *descendable* and she must *survive* him to share in his intestate estate. (emphasis added) 370 U.S. 70

Under Florida law Mrs. Waldrep was not a "co-owner" in the sense intended by this Court in *Davis*, i.e., a tenant in common with unfettered economic power over the property, because of the peculiar survival in Florida of the common law rule involving tenancy by the entirety.

At common law a wife's interest in tenancy by the entirety property was a titular and insignificant economic right since:

> a husband has the right, at common law, in his own right and jure uxoris, to the control, possession, and usufruct of property in which he and his wife have an estate by the entireties. . . . 41 AM JUR 2d, *Husband and Wife*, §67:

Accord, Merrill v. Adkins, 180 So. 41, 44 (Fla. 1938).

While there is a divergence of decision among the states as to the impact on this common law rule of the Married Women's Property Acts, Florida is unique in that its statute expressly preserved and left undisturbed the above common law rule pertaining to tenancy by the entireties. Section 708.10, FLORIDA STATUTES, enacted in 1943, provides:

> 708.10 (*Married Women's Rights*); *construction of law*—
>
> • • •

This law shall not be construed as:

(2) Abolishing estates by the entireties or *any of the incidents thereof;* (emphasis added).

Only one federal court has dealt squarely with the question of applying the "dignity of co-ownership" criteria of *Davis* to husband-wife jointly owned property. In *Collins, Jr. v. Commissioner*, 388 F.2d 353 (10th Cir. 1968), *affirming* 46 T.C. 461, the Tenth Circuit initially held that:

> whatever the nature of the rights granted by Oklahoma law to spouses in jointly acquired property it is clear they do not include the traditional ownership rights in property. These rights such as descendable interest, right to control and disposition of property and vested interest are set out by the Supreme Court in *United States v. Davis, supra*, as factors that distinguish a marital division in satisfaction of a legal obligation from a division between co-owners. *Since these traditional elements of co-ownership are lacking the fact that in making a decision the state courts speak as though they were dividing property between co-owners does not prevent the federal courts from saying that for tax purposes the division was in satisfaction of a marital obligation and thus taxable.* (388 F.2d 357) (emphasis added)

The husband then secured from the Oklahoma Supreme Court, *Collins v. Oklahoma Tax Commission*, 446 P.2d 290 (Okl. 1968) its decision that the state income tax assessment on his stock transfer to his wife was invalid;

the Oklahoma Court held that under the peculiar state assessment on his stock transfer to his wife was invalid; Okla.S. 1961, § 1278,[1] such a statutory division of jointly acquired property

> may be decreed even though the court does not dissolve the marriage. *Miles v. Jones*, 197 Okl. 684, 173 P.2d 949. Also see *Bouma v. Bouma*, Okl., 439 P.2d 198. (446 P.2d 295)

The husband then secured from this Court a writ of certiorari, *Collins v. Commissioner*, 393 U.S. 215 (1968), remanding the case back to the Tenth Circuit "for further consideration in the light of the opinion of the Supreme Court of Oklahoma in *Collins v. Oklahoma Tax Commission*."

The Tenth Circuit, on remand, 412 F.2d 211 (1969) rejected the Commissioner's principal argument as to the meaning of "dignity of co-ownership" (that when this Court in *Davis* discussed such factors as right of control, descendable interest, etc., *federal criteria* were established that must be met before the rights conferred by state law can be said to constitute co-ownership). The Tenth Circuit concluded that it must "look to the law of the state" and that the "language of *Davis* will not support (the Commissioner's) interpretation", 412 F.2d 212.

[1] 12 Okla.S. 1961, § 1278: "• • • As to such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof. • • •"

While Petitioner agrees with the latter statement and acknowledges that the mandate of *Davis* seems to clearly require a careful examination of state law before answering the question of whether a particular transfer reaches the dignity of co-ownership, the very differences between the property law concepts of Oklahoma on the one hand and Florida on the other indicate clearly why in the instant case the District Court and the Fifth Circuit were in error.

The only reason the Tenth Circuit's initial conclusion in *Collins* that

> "the rights granted by Oklahoma law to spouses in jointly acquired property . . . do not include . . . descendable interest, right to control and disposition of property . . . set out . . . in *United States v. Davis* . . .", 388 F.2d 357

was, in effect, repudiated by this Court was its erroneous interpretation of Oklahoma law. The key fact on which the *Collins* case ultimately turned was that under Oklahoma decisional law a statutory division of jointly acquired property could be decreed *even though the court might not dissolve the marriage*, i.e. either spouse had viable economic and legal rights that could be asserted and given effect in a proceeding under the Oklahoma statute. Significantly, a wife could compel such a division of joint property even though she might not be entitled to a divorce.

In complete contrast, Florida law has never permitted — absent a divorce — partition of tenancy by the entirety property during the joint lives of the husband and wife. *Logan Moore Lumber Co. v. Lagato*, 100 Fla. 1451, 131 So. 381 (1930), *Hunt v. Covington*, 145 Fla. 706, 200 So.

76 (1941) and the Florida Supreme Court had even held that absent the rendition of a divorce decree a chancellor had no power to alter any of the unities (such as right of possession) of a tenancy by the entirety, *Junk v. Junk*, 65 So.2d 728 (Fla. 1953).

The Tenth Circuit's original decision, to the extent of applying the "dignity of co-ownership" criteria to jointly acquired (or jointly owned) property, is additional authority beyond the very language used by this Court in *United States v. Davis* for the proposition that the District Court and the Fifth Circuit failed to correctly apply the *Davis* concept to the Waldrep property settlement transfer.

Petitioner therefore submits that when Jewell Waldrep began the negotiations that led to the property settlement agreement she had no right of management, no right to partition the tenancy by entirety realty, and no descendable interest therein. As in *Davis*, absent being able to negotiate a settlement, the only way she would get anything would be to survive her husband.

Of equal if not greater importance she had no right to get out of the marriage itself. It should be noted that in 1957 Florida had not yet enacted the "no fault divorce" law (Chapter 61, Florida Statutes took effect July 1, 1971) whereby a marriage could be dissolved on the simple pretext that it was "irretrievably broken"; if Mrs. Waldrep wanted "out" of her marriage in 1957 she had the difficult task under Florida law of proving her husband guilty of serious marital misconduct and had to prove his misconduct through her testimony *and* that of a corroborating witness, *Chisholm v. Chisholm*, 98 Fla. 1196, 125 So. 694 (1929).

Surely it must be recognized that there was a bargained for exchange in the Waldrep divorce: she wanted out of the marriage and some property in her own right. Bitterly contesting her claim for divorce her husband wanted (and ultimately got) the *quid pro quo*, a full and complete release of all her claims including *alimony* and dower. It can hardly be doubted that her alimony claim was a substantial and viable claim under Florida law in view of the long marriage, the great amount of wealth the husband had accumulated in his dairy farm, her completely broken state of health and her inability to support herself. See generally 10 FLA.JUR. *Dissolution of Marriage, Etc.* §§ 52-55.

Davis clearly indicates that the most important of all factors is the wife's acknowledgment that the settlement she receives is in full satisfaction of all of her then-pending marital claims against her husband.

Historically, as the *Davis* opinion noted, 370 U.S. 67-68, the Courts of Appeal had never doubted that a transfer of valuable property rights to a wife in exchange for her relinquishing such rights was a taxable event; rather, the conflict among the Circuits that *Davis* resolved dealt with the secondary problem of how should a court value the wife's marital rights. It is therefore extremely significant in this case that the Waldrep property settlement agreement's release provision is virtually identical to the release provision in the *Davis* agreement:

DAVIS Provision	WALDREP Provision
in full settlement and satisfaction of any and all claims and rights against the husband whatsoever (including but not by way of limitation, dower and all rights under the law of testacy and intestacy	(4) That the Wife covenants and agrees that she is accepting the property as set forth above as and for and in lieu of any support money, maintenance, alimony, right of dower and any and other rights, claims or demands of any nature or c h a r a c t e r whatsoever, past, present or future, which she now has or hereafter can or may have against the Husband and/or his properties or estate and the same is for a full, complete and final settlement.
support payments for wife were provided	(5) The Wife does absolutely and without reservations or restrictions of any kind, waive any and all claims for alimony, support money or maintenance, except as set forth in this Agreement, either now or in the future.

As in *Davis*, not only was the quantum of Jewell Waldrep's "ownership" under Florida law less in dignity than that of a co-owner but the full release of marital rights was the critical factor present in the instant case as in *Davis*. The District Court should have concluded the transfer was a taxable event in 1957.

2. *Basis Of Conflict With Pulliam v. Commissioner:*

Petitioner submits that wholly apart from the above proposition that, as a matter of federal law, Mrs. Waldrep's interest in tenancy by the entirety Florida lands did not meet the "dignity of co-ownership" standard established by *Davis*, there is an added independent reason for granting a writ of certiorari: the District Court failed to recognize (*for federal income tax purposes*) Mr. Waldrep as the real owner of *all* of the tenancy by the entirety property and its decision was therefore in direct conflict with that of the Tenth Circuit in *Pulliam v. Commissioner*, 329 F.2d 97 (1964).

In *Pulliam* the property in question was placed by the taxpayer-husband in the wife's name alone — not even in joint names — but the Tax Court examined all of the facts and circumstances (including the husband's *motive* for the transfer) and concluded that the real purpose for which title had been placed in the wife's name was to enable the husband to gain additional grain growing allowances. Giving full effect to the reality and substance of this "transfer" *for federal income tax purposes*, the Tax Court stated, *David P. Pulliam*, 39 T.C. 883 (1963), 884:

> "The Dry Land property was purchased by David in 1943 *but he had title placed in O'nan's name* in order to obtain a larger grain-raising allotment than he could have obtained had he taken title. He managed and controlled that property and its earnings as his own. He did not intend to make a gift of the property and he was the equitable owner of that property until the decree gave it to O'nan". (emphasis added)

The Tax Court, 39 T.C. 885, expressly rejected Pulliam's argument that the gain on this property should not be taxed on the ground that title was only in his wife, i.e., for purposes of a *Davis* application, he was regarded as the owner. In the instant case the District Court's statement in its Memorandum Opinion (App. 6) that *Pulliam* involved "a wife's interest in Colorado land owned *solely by her husband* . . ." is simply not correct.

A careful reading of the *Pulliam* opinion of the Court of Appeals for the 10th Circuit, 329 F.2d 97 (1964) (which affirmed the Tax Court decision), indicates that the Court of Appeals never upset or contradicted the finding of fact and conclusion of law in the opinion of the Tax Court; on appeal, the focus was on the question of whether *Davis* did apply absent a property settlement agreement and the 10th Circuit made it a point of not characterizing the transfer "as being voluntary or involuntary". Again, dealing with the secondary question raised on appeal (no release of the wife's marital rights was *signed* by her) the 10th Circuit found that the crux of *Davis* is that the divorce decree:

> "transferred property to the wife to satisfy whatever rights she was asserting or which were otherwise in issue."

Although Mr. Pulliam did not attack on appeal the Tax Court's conclusion that he was the real owner of the property there can be no doubt that the Tenth Circuit adopted and approved the Tax Court's approach by virtue of the following statement in the last paragraph of the Tenth Circuit's opinion:

> *The transfer here concerned was a taxable event* to support an imposition of the tax on the husband *as held by the Tax Court* and the Commissioner. Their method of valuation of that received by the husband was likewise correct. (329 F.2d 100) (emphasis added)

Turning to the facts of the instant case and comparing Wiley Waldrep's conduct and intent to that of Mr. Pulliam the District Court should have concluded, as trier of fact on this issue, that Wiley Waldrep titled these properties in joint names to defraud his judgment creditor. It was undisputed that he suffered two foreclosures and a judgment in quick succession; his decision to direct that his milk checks be payable to himself and his wife was clearly a fraudulent act as to the judgment creditor. See Section 726.01, FLORIDA STATUTES, the Florida enactment of the Statute of Elizabeth (13 Eliz. c.5). Was Mr. Waldrep any less fraudulent—less concerned about his judgment creditor whom he was unable to pay from 1932 until 1941—in his land buying methods?

Whereas it would be plausible for him to acquire the family homestead in joint names (Petition, page 5) as is commonly done, there is only one reason for him to have secretly titled nearly all of the other properties in joint names. He was adhering to the same course of conduct to which he admitted in regard to the milk checks—the land was so titled to escape the lien of the judgment. Under Florida law a recorded judgment against one spouse could not be a lien against the real property acquired in the joint names of both spouses, *Ohio Butterine Co. v. Hargrave*, 79 Fla. 458, 84 So. 376 (1920).

Both spouses testified that at no time in 30 years of marriage did he disclose to his wife that she too was a grantee on the deeds. Could the record in this case even suggest—let alone support— the idea that Wiley Waldrep was not the real owner of these lands?

As soon as marital difficulties loomed a few years before the divorce he bought nearly all the remaining lands purchased in his own name.

If Mrs. Waldrep was never advised of her ownership interest by her husband his conduct certainly negated any suggestion of donative intent on his part.

It was therefore logical and entirely proper that the District Court look to the substance of Wiley Waldrep's conduct and conclude that the evidence painted a very clear picture of a man who secretly titled his lands in joint names to defraud his judgment creditor.

Petitioner concedes that this manner of land buying continued after the judgment was satisfied in October, 1941, but it was certainly plausible to infer that this was a mere continuation of a pattern that had been established with fraudulent intent beginning in 1936. Again, we hasten to point out that his adherence to this habit was certainly not grounded in concern for his wife—he still kept it secret from her after 1941.

The District Court's Memorandum Opinion does not find, as matters of fact, whether or not Jewell Waldrep knew of the posture of title to the jointly held lands at the time she executed the property settlement agreement, nor does it make a finding of fact as to *why* the properties

were titled in joint names once the judgment had been entered against the husband in 1932.

Every decision by a federal tribunal that has applied *United States v. Davis* has had one common characteristic: every significant fact has been considered, a *Davis* application being one that is always made in the light of a full, thorough consideration of *all* the circumstances.

If Petitioner is correct in its argument that an application of *Davis* to a Florida tenancy by the entirety *does* hinge on and make relevant to the legal inquiry the factual nuances present in this case, *viz.* whether the wife knew of the joint tenancy, which spouse furnished the consideration for the purchase of the lands and whether the titling in joint names was done for the purpose of evading creditors of the husband, then we submit that to the extent the District Court's Memorandum Opinion is silent on these vital matters the Final Judgment lacks finality (see generally 5A MOORE'S FEDERAL PRACTICE, Par 52.11 [2]).

In summary, the critical facts were these: totally relying upon a factual picture painted over many years by her husband's fraud, Mrs. Waldrep went to the bargaining table at the time of her divorce believing that *he* owned the lands and she owned her marital rights; yes, she did get approximately one-half of the lands (excluding the buildings' value which her husband retained) but from her standpoint she was receiving half *of her husband's property* and for this she gave up a full release of her marital rights. Paragraph 4 of the agreement, set forth on Appendix pages 18-19, tells us clearly what the parties believed the land allotted to Mrs. Waldrep was for, *viz.*

> "as and for and in lieu of any . . . alimony . . . and any other rights, claims or demands . . . she now has . . ."

This is what Wiley Waldrep wanted and got. As noted (Petition, page 10) Mr. Varon, her divorce attorney, summed it up in these words:

> "She gave up everything in order to get what she is getting here."

Wiley Waldrep *bought* this release of marital rights and it was only on his terms that Mrs. Waldrep was able to get out of the marriage. He "sold" $1,329,200 worth of "his" property to Mrs. Waldrep and never reported the difference between this figure and his basis of some $11,500 a long term capital gain of $1,317,700. This was the taxable event that the Government should have found and which this Court should now recognize by granting a writ of certiorari.

Pulliam and *Davis* should be given full effect by holding that Wiley Waldrep was the real owner of the property transferred to Mrs. Waldrep for her release of marital rights. To otherwise ignore the realities of the husband's deception would frustrate the effective administration of the income tax laws.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

/s/ Samuel L. Heller

JOHNSON, HELLER & BIRNBAUM, P.A.
Attorneys for Petitioner
BETH W. CORPORATION
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of this Petition for Certiorari were air-mailed this 13th day of November 1973, to each of the following:

SCOTT P. CRAMPTION,
Assistant Attorney General
Tax Division
United States Department of Justice
Washington, D.C. 20530

ROBERT W. RUST,
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Solicitor General
Department of Justice
Washington, D.C. 20530

/s/ Samuel L. Heller
SAMUEL L. HELLER

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
FLORIDA, MIAMI DIVISION

NO. 72-213-Civ-CA

BETH W. CORPORATION
a Florida corporation,

Plaintiff,

v

UNITED STATES OF AMERICA

Defendant.

MEMORANDUM OPINION

This income tax refund suit is before the Court following a jury trial of certain issues. At the time of the pretrial conference, ruling on defendant's motion for partial summary judgment was reserved by the Court, pending further inquiry as to whether any factual issues remained on the question of the tax implications of the 1957 property settlement agreement.

Plaintiff and defendant have now agreed that the question posed, whether or not the division of the property under the 1957 property settlement agreement was a nontaxable division of property between co-owners under *United States v. Davis*, 370 U.S. 65 (1962), should be

submitted to the court for decision. This submission is based on the agreement of the parties that this mixed question of law and fact is approximately 97% law and 3% fact. After consideration of all the evidence adduced at trial, it is clear that the defendant is entitled to judgment as a matter of law.

The relevant facts of this case may be recited briefly as a foundation for discussion of the legal question posed. The plaintiff, Beth W. Corporation, which was incorporated in 1962, is owned by Jewell Waldrep, its president. Jewell and Wiley Waldrep were married on January 24, 1927. On December 20, 1957, pursuant to a property settlement agreement entered into on December 18, 1957 during their divorce proceedings, each of the Waldreps conveyed to the other certain real properties owned by them. Later, on May 17, 1963, Jewell Waldrep transferred to the plaintiff corporation, in exchange for all of the corporation's common stock, 796.27 acres of the land she had received from her husband in the property settlement. On August 31, 1964, the plaintiff sold 40 of these acres for $113,100. At issue here is the amount of the income tax liability resulting from said sale. It is stipulated that plaintiff's May 17, 1963 basis in the land it acquired from Jewell Waldrep was the same as her basis in the land at the time of the transfer to the plaintiff.

This Court must determine the basis of that land in the hands of Jewell Waldrep at the time she received it pursuant to the property settlement. The plaintiff argues that her basis was the fair market value of the land on December 18, 1957, the date of the property settlement agreement. The government contends that the basis was the original cost of the land to Jewell and Wiley Waldrep.

Resolution of this issue depends on whether the distribution of this realty pursuant to the property settlement agreement was, as plaintiff contends, a taxable event or merely a nontaxable division of property between co-owners, as defendant asserts. If the conveyance was a taxable event, the husband should have been taxed on the gain and the wife's basis in the land would become its fair market value at the time of transfer. If, however, the distribution was a non-taxable division of property, the wife took the property with the same basis it had when owned by both husband and wife. The gain created by the appreciation in value of the land would then be subject to taxation upon the occurrence of a subsequent taxable event.

It is agreed that the relevant acreage was held by Jewell and Wiley Waldrep as tenants by the entireties. It is also agreed that the issue posed to the Court for decision requires a comparison between the facts of this case and the facts and rules laid down in *United States v. Davis, supra*, and its progeny.

In *Davis*, the taxpayer, pursuant to a property settlement and separation agreement, transferred to his wife certain personal property. This property was owned by the taxpayer under state law subject to his wife's statutory interest, akin to dower, in the property. Attempting to tax the appreciation in the property value as capital gain realized by the taxpayer upon the transfer to his wife, the Commissioner found a taxable "sale or other disposition" of the property.

Before the Supreme Court the taxpayer argued, as does the government in the case *sub judice*, that the trans-

fer was a nontaxable division of property between two co-owners. This was rejected by the unanimous Court:

> The taxpayer's analogy, however, stumbles on its own premise, for the inchoate rights granted a wife in her husband's property by the Delaware law do not even remotely reach the dignity of co-ownership. The wife has not interest — passive or active — over the management or disposition of her husband's personal property. Her rights are not descendable and she must survive him to share in his intestate estate. Upon dissolution of the marriage she shares in the property only to such extent as the court deems 'reasonable.'

United States v. Davis, 370 U.S. 65, 70 (1962). As the Court viewed the state law, "Delaware seems only to place a burden on the husband's property rather than to make the wife a part owner thereof." *Id.*

In Florida, however, the wife's interest in property held by the entireties is considerably greater than a mere liability imposed on the interest of the husband. It is readily apparent that such an interest attains "the dignity of co-ownership," as that phrase is used in *Davis*. The essence of the entireties concept is that each spouse is seised of the whole and not of a share, moiety, or divisible part. *See, e.g., Bailey v. Smith*, 89 Fla. 303, 103 So. 833 (1925), *Naurison v. Naurison*, 132 So.2d 623 (Fla. App. 1961). Property held as a tenancy by the entireties cannot be partitioned during the marriage of the tenants. *Naurison, supra.* It is not subject to execution to satisfy the debt of either spouse. *France v. Hart*, 170 So.2d 52 (Fla. App. 1964). One spouse alone cannot, without the joinder

of the other, convey, sell, lease, or encumber any part of the estate. *See, e.g., Montgomery v. Gibson*, 69 So.2d 305 (Fla. 1954). Upon the death of one spouse, the estate by the entireties is vested by operation of law in the surviving spouse. Upon divorce, the tenants become tenants in common. F.S.A. §689.15. Surely these features of the estate by the entireties indicate that a wife holding such an interest is, in actuality as well as in theory, a co-owner of the subject property.

Plaintiff, perhaps sensing the weakness of the attempted analogy between the property interest discussed in *Davis* and the Florida estate by the entireties involved here, relies upon certain post-*Davis* cases. It argues that these cases, most notably *Pulliam v. Commissioner*, 329 F.2d 97 (10th Cir.), *cert. denied*, 379 U.S. 836 (1964), and *Hornback v. United States*, 298 F.Supp. 977 (W.D. Mo. 1969), are more similar to the fact situation *sub judice*.

Hornback, however, supports the defendant's characterization of the property settlement agreement. In that case the taxpayer-wife conveyed certain jointly owned property to her husband as part of a property settlement during their divorce. In return the husband gave a note in payment for her surrender of her interest in the real estate. As the district court viewed the transaction:

> the property settlement here in question was a taxable transaction. The parties did not simply divide their jointly owned property. Rather Mrs. Hornback liquidated her interest in the joint property by sale. She sold her interest in the real estate to Mr. Hornback and he paid for it by his

> note which by the supplemental agreement was payable over a period of years.

Hornback v. United States, supra, 298 F.Supp. at 983. The illustrations in *Hornback, Id.* at 981-82, describe the case *sub judice:* "If husband and wife literally divide or partition the property . . . so that each just gets his own proper part, there is no taxable transaction involved."

Such an equal division was the essence of the Waldreps' settlement. Wiley Waldrep testified that the basis for the apportionment of property between him and his wife in the property settlement agreement was an attempt to arrive at a 50%-50% division of the jointly owned property, based upon current market values. This valuation is reflected in item 5(7) of the pretrial stipulation. Thus the Waldrep transaction resembles a non-taxable division of property between co-owners. *Pulliam v. Commissioner, supra*, involving a wife's interest in Colorado land owned solely by her husband and very similar to the Delaware interest described in *Davis*, does not mandate a different conclusion.

Accordingly, it is the opinion of the Court that no taxable transaction took place in December of 1957 when Wiley and Jewell Waldrep conveyed certain property to one another. Therefore the basis of the land received by Jewell Waldrep, and ultimately by the plaintiff, was its original cost basis. This basis, the parties have stipulated, was between $11.34 and $15.65 per acre for the 40 acres sold by the plaintiff. The Commissioner correctly assessed a deficiency against plaintiff for capital gains resulting from the sale of the 40 acres. Judgment must therefore be entered for the defendant.

As an alternative basis for deeming the 1957 transaction a non-taxable event, the defendant contended that the property settlement agreement was a non-taxable division of partnership property upon the dissolution of a partnership between Wiley and Jewell Waldrep. Plaintiff contended that no partnership existed. The excellent pretrial stipulation prepared by able counsel made it possible to submit a single question to the jury on this issue. The jury answered special interrogatory Number (1), "Was a partnership formed between Wiley Waldrep and Jewell E. Weldrep during their marriage?" in the negative.

The jury's finding is, of course, not inconsistent with the Court's ruling on the *Davis* issue. Indeed, the jury was instructed, at plaintiff's request, that "the mere fact that a husband and wife hold title to such lands as tenants by the entireties is not sufficient to establish a partnership between the husband and the wife." The jury finding does mean, however, that the judgment for the defendant rests solely on the Court's ruling that the December, 1957 conveyances constituted a non-taxable division of property between co-owners.

This memorandum contains the Court's findings of fact and conclusions of law pursuant to Rule 52(a), F.R.C.P. A separate judgment will be entered in this cause.

ENTERED at Miami, Florida this 20th day of November, 1972.

/s/ C. Clyde Atkins

United States District Judge

* * *

APPENDIX B

FINAL JUDGMENT

THIS action came on for trial before the Court, and the issues having been duly tried, and the Court having previously entered its findings of fact and conclusions of law in memorandum form, it is ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant United States of America recover of the plaintiff Beth W Corporation its costs of action, to be taxed by the Clerk of the Court.

Entered at Miami, Florida this 20th day of November, 1972.

/s/ C. Clyde Atkins

United States District Judge

* * *

APPENDIX C

ORDER ON POST TRIAL MOTIONS

THIS CAUSE came before the Court on the government's motion to set aside the jury verdict on the partnership issue and plaintiff's motion to amend and supplement the findings of fact and conclusions of law. I have carefully considered the record and the memoranda submitted in support of said motions.

* * *

For the reasons detailed above, the defendant's motion to set aside the jury verdict is denied.

B. Plaintiff's motion to amend and supplement findings of fact, conclusions of law and amend final judgment seeks to expand the Court's findings into areas that are either unsupported by credible evidence or of only tangential relevance. I will, however, supplement the previously entered findings of fact, contained in my November 20, 1972 memorandum opinion by the addition of the following paragraph, which falls, in my opinion, into the category of tangentially relevant matter:

The property in dispute was purchased by Wiley Waldrep, either in his name or, in other instances, jointly with his wife, Jewell Waldrep. The latter did not always know of the purchases. She did not know, until institution of the divorce proceeding, whether the property had been acquired in the name of her husband or in their joint names. Both Wiley and Jewell Waldrep contributed to the initial success of the dairy business. Her contribution was

limited and at times curtailed, by her illness. The evidence points strongly to the conclusion that monies from the dairy business were used to purchase the property in question.

IT IS THEREFORE ORDERED AND ADJUDGED that, with the exception of the addition noted above, plaintiff's motion to amend and supplement is denied.

ENTERED at Miami, Florida this 26th day of December, 1972.

/s/ C. Clyde Atkins

United States District Judge

* * *

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1746
Summary Calendar*

BETH W. CORPORATION,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(August 15, 1973)

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

PER CURIAM: AFFIRMED.[1] See Local Rule 21.[2]

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*Rule 18, 5th Cir., Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]*Beth W. Corp. v. United States*, 350 F.Supp. 1190 (S.D. Fla. 1972).

[2]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir., 1970, 430 F.2d 966.

APPENDIX E

COMPLAINT

Plaintiff, BETH W. CORPORATION sues the Defendant UNITED STATES OF AMERICA, and . . . alleges that:

* * *

4. During the marriage of the WALDREPS, WILEY WALDREP was engaged in the dairy farming business and acquired over approximately 30 years a substantial amount of land in Broward County, Florida. These lands were acquired with the funds of WILEY WALDREP and all of said lands or some of these lands were used by him in his dairy farming business.

5. Incident to the aforementioned divorce proceeding, JEWELL WALDREP and WILEY WALDREP entered into a Property Settlement Agreement on December 18, 1957, which was approved by the said Circuit Court of Broward County, Florida and made a part of its Final Decree in said proceedings . . . , marked Plaintiff's Exhibit A.

6. Under said . . . Agreement, WILEY WALDREP agreed to transfer to JEWELL WALDREP certain real and personal properties . . . including approximately 820 acres of . . . land . . . which JEWELL WALDREP agreed to accept as and for and in lieu of any support money, maintenance, alimony, right of dower, and any other rights, claims or demands she then or might thereafter

have against WILEY WALDREP. Said lands were in fact conveyed to JEWELL WALDREP by WILEY WALDREP (on) . . . December 20, 1957.

7. JEWELL WALDREP'S basis for said 820 acres of land upon her acquisition of the same from WILEY WALDREP as alleged above was its fair market value on December 20, 1957.

* * *

16. On September 12, 1969, the District Director made a deficiency assessment against Plaintiff for its fiscal year ending July 31, 1965 of $2,969.33 . . . based in part upon the District Director's determinations:

a. that the long term capital gain on the above sale transaction was $112,700 based upon the determination that Plaintiff's 40 acres had a cost basis of $10.00 per acre or a total of $400.00 instead of the claimed basis of $200,000, or

* * *

17. Plaintiff alleges that these determinations described in paragraph (16) were improper and that the additional income tax and interest was erroneously and illegally assessed and collected.

* * *

APPENDIX F

PROPERTY SETTLEMENT AGREEMENT

THIS AGREEMENT, made and entered into this 18 day of December, A.D. 1957, by and between JEWELL WALDREP . . . and WILEY WALDREP . . .

* * *

NOW, THEREFORE, in consideration of the mutual promises, covenants and of the premises, the parties hereto mutually agree as follows:

* * *

(3) That the Wife is to receive . . . the following:

(a) 1955 Cadillac.

(b) The . . . three-bedroom home located at 2816 N. E. 26th Place, Fort Lauderdale, Florida, . . .

* * *

Together with all the furniture, furnishings and personal property.

Subject to the . . . existing First Mortgage . . . of approximately $16,600.00, ...

(c) United States Savings Bonds Series E (all matured) [$3,000.00].

* * *

(d) One-half of the cash surrender value of the following life insurance policies . . .

(e) The sum of $3,000.00 in cash to equalize the holdings of stock in the Citizens' Bank at West Hollywood, and 3.04705 shares of stock of Store Equipment and Finance Company, which last named stock shall hereafter be the sole property of the Husband; and each party will retain the Bank stock now issued in their respective names.

(f) An undivided one-half of all the cash in the savings account of both parties . . . .

(g) One-half of all of the capital stock of Home Milk Producers Association . . . .

(h) The real estate and improvements known as the 7th Avenue property . . . .

(i) An undivided one-half interest in . . . . (the $17,000 Detjen note).

(j) All of the vacant land located in Sections 5 and 9 . . . consisting of 820 acres, ...

(k) Life insurance policy issued by . . . on the life of the Wife of which the Husband is the beneficiary.

(l) All clothing, personal effects, jewelry and personal property.

(4) That the Wife covenants and agrees that she is accepting the property as set forth above as and for and

in lieu of any support money, maintenance, alimony, right of dower and any and other rights, claims or demands of any nature or character whatsoever, past, present or future, which she now has or hereafter can or may have against the Husband and/or his properties or estate and the same is for a full, complete and final settlement.

(5) The Wife does absolutely and without reservations or restrictions of any kind, waive any and all claims for alimony, support money or maintenance, except as set forth in this Agreement, either now or in the future.

* * *

(7) The Husband is to receive as and for his absolute property the following:

(a) 1957 Chevrolet Sedan.

(b) The following life insurance policies . . . .

(c) 3.04705 shares of stock — Store Equipment and Finance Company.

(d) All clothing, personal effects, jewelry and personal property.

(e) An undivided one-half of all of the cash in the savings account of both parties . . . .

(f) One-half of all of the capital stock of Home Milk Producers Association . . . .

(g) An undivided one-half interest in . . . (the Detjen $17,000 note).

(h) All the cattle, dairy equipment and dairy buildings located in Broward County, Florida, known as Waldrep Dairy.

(i) All of the vacant real estate comprising Sections 3, 4 and 10 . . . .

(8) The Husband does hereby agree to be . . . responsible for the payment and discharge of the existing First Mortgage . . . of approximately $16,600.00 . . . on the residence located at 2816 N.E. 26th Place, Fort Lauderdale, ...

* * *

12. The Husband agrees to pay and discharge all existing joint obligations of the parties hereto, and particularly the $75,000 note due the Dania Bank, Dania, Florida.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and years first above written.

* * *

APPENDIX G

STATUTES INVOLVED

INTERNAL REVENUE CODE OF 1954

SEC. 1001. DETERMINATION OF AMOUNT OF AND RECOGNITION OF GAIN OR LOSS.

(a) COMPUTATION OF GAIN OR LOSS.—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) AMOUNT REALIZED.—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. In determining the amount realized —

* * *

(c) RECOGNITION OF GAIN OR LOSS.—In the case of a sale or exchange of property, the extent to which the gain or loss determined under this section shall be recognized for purposes of this subtitle shall be determined under section 1002.

* * *

SEC. 1002. RECOGNITION OF GAIN OR LOSS.

Except as otherwise provided in this subtitle, on the sale or exchange of property the entire amount of the gain or loss, determined under section 1001, shall be recognized.

No. 73-764

FILED
JAN 10 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

BETH W. CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-764

BETH W. CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question presented in the petition concerns the correct basis of land sold by petitioner in 1964.

In 1963, Jewell Waldrep transferred 796.27 acres of land to petitioner, in exchange for all of its common stock. This land was acquired by Jewell Waldrep in 1957 pursuant to a mutual property settlement agreement with her husband upon their divorce. Under the agreement, all of the real estate acquired during the marriage, which was held by Jewell Waldrep and her husband as tenants by the entireties under Florida law, was divided so that each of the parties was left holding land of essentially equal value (Pet. App. 2, 6). Petitioner thereafter sold 40 acres of the land for $113,100 (Pet. App. 2).

It is undisputed that petitioner's basis in the land is equal to Jewell Waldrep's basis as of the time of her transfer of the land to petitioner.[1] The question is whether petitioner's basis is the original cost of $1 per acre to Jewell Waldrep and her husband, as the government contended, or, as petitioner urged, the fair market value of $5,000 per acre as of the date of her divorce property settlement in 1957. The first basis figure would yield a taxable gain of $113,060 upon the 1964 sale, while the latter basis figure urged by petitioner would yield a taxable loss of $86,900.

Both courts below determined that Jewell Waldrep received the land in question under a division of property between co-owners under local law, which was nontaxable under this Court's decision in *United States* v. *Davis,* 370 U.S. 65. As a result, she did not receive a new basis in the property equal to its fair market value at the time of the settlement. Her basis in the property continued to be her original cost of $1 per acre (Pet. App. 1-7).

1. The decision below does not, as petitioner contends (Pet. 12-20), conflict with *United States* v. *Davis, supra.* There, pursuant to a property settlement, the taxpayer transferred securities, held in his name alone during marriage, to his former wife. Because of the husband's ownership, the Commissioner determined that, under the applicable law of Delaware, the transfer was a taxable event to the husband since it was in the nature of a transfer in exchange for the release of his independent legal obligations to his wife. In upholding the Commissioner's determination, this Court rejected the taxpayer's argument that the transfer was

---

[1] See Internal Revenue Code of 1954, Section 362(a).

a non-taxable division between two co-owners because the law of Delaware did not make the wife co-owner of her husband's personal property; it merely placed a burden on it. See 370 U.S. at 70-71.

But here, under Florida law, upon their divorce Jewell Waldrep and her husband each took one-half of the real estate which they owned as tenants by the entireties. The settlement was therefore a non-taxable division between co-owners.

Petitioner errs in contending (Pet. 17-19) that the courts below misinterpreted the applicable state law governing such co-tenancies. Under Florida law, a tenancy by the entireties is but one estate, held by one person (the married couple). Thus, each spouse owns the entire estate and not simply a divisible part. *Bailey* v. *Smith,* 89 Fla. 303, 103 So. 833; *Crawford* v. *United States Fidelity and Guaranty Co.,* 139 So. 2d 500, 501 (Fla. Dist. Ct. of App.). It cannot be partitioned during marriage. *Naurison* v. *Naurison,* 132 So. 2d 623 (Fla. Dist. Ct. of App.).[2] Nor can either spouse convey, lease or encumber such property without the joinder of the other, and such property is not sub-

---

[2] Compare *Collins* v. *Commissioner,* 412 F. 2d 211 (C.A. 10), on remand from this Court (393 U.S. 215) to consider an intervening state supreme court decision. The Tenth Circuit held that there was a non-taxable division of property because Oklahoma law gave the wife a vested co-ownership interest with respect to property acquired through the joint efforts of the spouses, which could be partitioned by a court even in the absence of divorce. This case must be viewed in the light of two subsequent Oklahoma Supreme Court decisions to the contrary. See *McDaniel* v. *Oklahoma Tax Commission,* 499 P. 2d 1391, and *Sanditen* v. *Sanditen,* 496 P. 2d 365, both holding that the wife has a vested interest in the jointly acquired property only for purposes of divorce dispositions.

ject to execution to satisfy the debt of either spouse. *France* v. *Hart,* 170 So. 2d 52 (Fla. Dist. Ct. of App.); *Montgomery* v. *Gipson,* 69 So. 2d 305 (Fla.). Upon the death of one spouse, such property is vested by operation of law in the surviving spouse, and upon divorce the tenants become tenants in common. Fla. Stat. Ann. §689.15. In light of the attributes of a tenancy by the entireties under Florida law, the courts below correctly held that Jewell Waldrep's rights in the real estate in question attained "the dignity of co-ownership" within the meaning of the *Davis* decision (Pet. App. 4).

2. Petitioner further argues (Pet. 21-26) that the decision below is in conflict with *Pulliam* v. *Commissioner,* 329 F. 2d 97 (C.A. 10), certiorari denied, 379 U.S. 836, affirming 39 T.C. 883. That case did not involve a tenancy by the entireties or any other co-ownership status recognized under local law. There, in a Colorado divorce, the local court permitted each spouse to retain property then standing in their separate names, except for certain realty as to which the decree was to constitute a conveyance from husband to wife. With respect to the latter property thus "conveyed" to the wife, the courts held that the *Davis* rule applied even though the transfer was effected by the decree rather than by the husband's deed.[3]

3. Finally, there is no basis for petitioner's contention (Pet. 23-24) that under Florida law the tenancies by the entireties at issue would be disregarded as a fraud on the husband's creditors. While a creditor of the husband

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[3] Although one parcel of this property was purchased by the husband in his wife's name, the Tax Court held (39 T.C. at 884-885) that the husband in fact owned the property.

had obtained a judgment against him, petitioner itself concedes (Pet. 24) that the purchasing of land under the form of tenancy by the entireties continued long after the last judgment creditor was satisfied in 1941.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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